No. 15,091.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation,
Appellant,

vs.

EMMA HUTCHISON, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased,
Appellee.

APPELLEE'S BRIEF.

SIMPSON, WISE & KILPATRICK,
RAYMOND C. SIMPSON,
GEORGE E. WISE,
ROBERT J. KILPATRICK,
355 Ocean Center Building,
Long Beach 2, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Rules

Statutes

Textbooks

No. 15,091.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation,

Appellant,

vs.

EMMA HUTCHISON, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment on a jury verdict for plaintiff rendered in the United States District Court for the Southern District of California, before the Honorable Ernest A. Tolin, Judge, in an action filed by plaintiff as administratrix and widow of Nathanael Patrick Hutchison, who died in April, 1951, in the course of his employment as an able-bodied seaman aboard the steamship Linfield Victory, operated by defendant, Pacific-Atlantic Steamship Company, a Delaware corporation. Jurisdiction of the cause below was based on Section 33 of the Merchant Marine Act of 1920 (46 U. S. C., Sec. 688), commonly known as the Jones Act, as implemented by Section 51 of the Federal Employers' Liability Act (45 U. S. C., Sec. 51).

This is the second appeal in this case. At the conclusion of the first trial a judgment had been entered in favor of defendant which was subsequently reversed by this Court and the cause remanded for a new trial. (*Hutchison v. Pacific-Atlantic Steamship Company,* 217 F. 2d 384.) At the second trial the jury rendered a verdict in favor of defendant on the first cause of action of the first amended complaint for conscious pain and suffering and a verdict for plaintiff in the amount of $45,000.00 on the second cause of action for wrongful death. [Tr. pp. 573-574.]

The amended complaint alleged in the customary language of Jones Act pleading that appellant operated the steamship, Linfield Victory, in transportation of freight for hire by water in interstate commerce and that on April 24, 1951, Hutchison was in appellant's employment aboard that ship as an able-bodied seaman.

Nevertheless appellant has challenged the jurisdiction of this court and the court below on the ground that there are no allegations in the first amended complaint that appellant is a common carrier or that Hutchison was a member of the crew of appellant. In this connection, appellant does not assert that it was a "private" carrier rather than a "common" carrier; nor does appellant assert that deceased was not in fact a member of the crew. Appellant's argument on jurisdiction is simply that the United States District Court in both trials and this Court on the first appeal were wholly lacking in jurisdiction to determine the matter on the merits, because the complaint did not allege those two facts (*i.e.,* that appellant was a "common carrier" and that decedent was a member of the crew of a "common carrier").

The short answer to the "common carrier" contention is that the matter of whether or not appellant was a com-

mon carrier is wholly irrelevant to a consideration of an action brought pursuant to the Jones Act. No case cited by appellant supports its position on this point; indeed, none of appellant's cases involves an action under the Jones Act or discusses that Act. The only case appellee's research has disclosed in which the argument was made that the coverage of the Jones Act is restricted to common carriers is *Ziegler v. Alaska Portland Packers' Ass'n,* 135 Ore. 359, 296 Pac. 38, and there it was summarily rejected, the Court stating at 296 Pac. 40:

> "We have found no case which construes this statute in such a restricted manner, nor do we find any language in any decision which lends support to such an interpretation."

The Federal Employers Liability Act is not to be taken as a rigid pattern for all rights granted by the Jones Act. *Taylor v. Atlantic Maritime Co.,* 179 F. 2d 597, 600. The Jones Act gives a right of recovery to the seaman as such, *Correia v. Van Camp Sea Food Co.,* 113 Cal. App. 2d 71, 248 P. 2d 81, 86, on any vessel, whether or not a "common carrier," plying in navigable waters, *McKie v. Diamond Marine Co.,* 204 F. 2d 132, 135-136. This includes even such vessels as a derrick anchored in the river for pouring concrete into forms, *Summerlin v. Massman Const. Co.,* 199 F. 2d 715, 716; and a dredge, *Early v. American Dredging Co.,* 101 Fed. Supp. 393, 395. The complaint alleged in effect, that Huchison was employed as a seaman on the Linfield Victory, a vessel plying navigable waters; no more is required.

Equally unmeritorious is the contention that the Court lacked jurisdiction because the complaint did not allege that Hutchison was a member of the crew. Again, none of appellant's cited cases so holds. The allegation of the

amended complaint that Hutchison was employed as an able-bodied seaman aboard the Linfield Victory, would be a sufficient allegation if one were required, since the Jones Act concept of seaman now includes only one who is a member of the crew. *McKie v. Diamond Marine Co.,* 204 F. 2d 132, 135-136. But, in fact, whether Hutchison was a member of the crew is not a jurisdictional issue. In *Schantz v. American Dredging Co.,* 138 F. 2d 534, a dismissal of the complaint for lack of jurisdiction, on the ground that plaintiff was not a member of the crew was reversed, the court stating at page 536:

> "Whatever may be the conclusion upon the question of whether plaintiff was a member of the crew, the issue is not one of 'jurisdictional fact' . . . . The court had jurisdiction to hear and decide the question, regardless of which side won the decision."

The same holding was reached in *McKie v. Diamond Marine Co., supra,* 204 F. 2d 132, 136.

Thus the argument that because of alleged omissions in the pleadings the trial court lacked jurisdiction to hear both the first and second trials and that this Court lacked jurisdiction to reverse the judgment on the first appeal, is shown to be groundless.

Statement of the Case.

Appellant's lengthy Statement of the Case (App. Op. Br. pp. 6-45) is cast as an argument for appellant rather than a statement of the facts. There was ample evidence to support the verdict of the jury, and appellee here sets forth facts showing that the verdict was so supported.

Nathanael Patrick Hutchison was in the employment of appellant on April 24, 1951, as an able-bodied seaman with maintenance duties aboard the S.S. Linfield Victory

[Tr. p. 166], a vessel then operated by appellant. [Tr. p. 269.] At 8:00 o'clock, on that morning, while the ship was in Baltimore, Hutchison and several other seamen were ordered to clean the tween deck of No. 3 hold. [Tr. pp. 131, 166-167, 200.] In descending to and ascending from the work area the men used, as they were supposed to do, an iron ladder in an access shaft in masthouse No. 2. [Tr. pp. 132, 207, 212-214.]

A reference to Plaintiff's Exhibit 12 (diagram of the masthouse) and Plaintiff's Exhibits 1 through 11 (photographs) furnishes a description of the masthouse where decedent met his death far better than any verbal description. As this Court succinctly stated in the prior opinion on appeal, "The ventilator shaft was uncovered and unlighted." (217 F. 2d 384.)

There were no electrical installations in the masthouse. [Tr. p. 266.] There was testimony that it is a custom aboard ship to thoroughly illuminate any area in which men are working. [Tr. p. 232.]

Several witnesses testified to the inadequate visibility inside the masthouse, whether the masthouse door was open or closed.

Kent Stephen Castle, Jr., a master of steam vessels with unlimited license, testified that in May, 1951, when he went aboard the Linfield Victory, it was quite dark in the masthouse with the door closed in the late forenoon. [Tr. p. 222.] John Hutchison testified that on May 27, 1951, he visited the Linfield Victory and went into the masthouse; that it was a bright day; that with the door closed it was absolutely dark in the masthouse; that with the door open, it was easy to see as soon as his eyes became accustomed to the relative darkness inside coming from the sunlight outside; that one had to get accus-

tomed to the darker light coming in from a bright light; that when he was inside the masthouse he could see the ladders with the door half-way open—any light would show the ladders; and that he saw no lights or light fixtures or any place where light fixtures had been in the masthouse. [Tr. pp. 283-289.] George E. Wise, one of plaintiff's attorneys, called by plaintiff merely to identify the manner in which the photographic exhibits were obtained, was questioned by appellant extensively on cross-examination about conditions of visibility. He testified on such cross-examination that he visited the Linfield Victory on May 10, 1952, opened the door to the masthouse and looked inside; that with the door open in broad daylight, without any other kind of light inside the masthouse, it would be like looking into a closet with the door open; that he could see that there were things such as pipe railings but could not see anything clearly, as if there were lights on; that he did not look specifically to see whether there were openings in the masthouse floor for a ladder or anything like that—he had no recollection of seeing them before going inside to look for them; that standing at the door of the masthouse with the door open and with the daylight present on that day, he thought he could have seen openings in the deck of the masthouse. [Tr. pp. 168-177.]

While Henry C. Dyer, appellant's marine superintendent, testified in effect that the lighting was adequate, although diminished [Tr. pp. 323, 327, 329], Kenneth Albert Webb, a marine surveyor also called by appellant, testified that when he went aboard the Linfield Victory

to make a survey he asked to have lights put in the masthouse during the time of the survey; that the light inside the masthouse was so diminished that to do this surveying properly, he needed lights. [Tr. pp. 251, 252.]

There was also testimony regarding the inadequacy of protection against the open ventilator shaft for seamen using the adjacent access ladder. As shown by photographs [Pltf. Exs. 9 and 10] and by the diagram of the inside of the port compartment of masthouse No. 2 [Pltf. Ex. 12], the ventilator shaft in which Hutchison's body was found was inside masthouse No. 2, immediately adjacent to the access shaft containing the ladder used in going to and from the tween deck area. The two shafts are separated by a metal bulkhead, and the ladder is fastened to that bulkhead. The ventilator shaft was open and uncovered with two pipe railings around it, one 42½" above deck level and the lower railing about half way between the deck and the upper railing. There was a similar ventilator shaft in the starboard compartment of masthouse No. 2, shown in the photograph, Plaintiff's Exhibit 4, which was completely covered by a vertical metal bulkhead, so that unlike the one of the port side, it had no opening. [Tr. p. 233.] In other words, the starboard ventilator shaft was "not available" because of the bulkhead. [Tr. p. 327.] On other ships heavy screens had been placed over similar ventilator shafts to exclude the dangerous area where it was near an area of access. [Tr. pp. 142-143, 233-235.]

Hutchison worked in the tween deck hold for at least part of the morning on April 24, 1951. Amundsen saw

him leaving the hold at about 11:00 o'clock that morning and did not see him alive again [Tr. p. 135], with the possible exception that the witness was not altogether sure he did not see Hutchison at lunch. [Tr. p. 151.] In any event, the witness did not see Hutchison come back to the hold after he left at 11:00 o'clock. [Tr. p. 151.] Hutchison was seen by the witness Kalnin coming out of the masthouse containing the access ladder at lunch time. [Tr. pp. 190, 206-207.] The witness saw Hutchison last either in the messroom [Tr. p. 209] or on the companionway coming from the messroom. [Tr. p. 208.] Hutchison did not return to work with the other men at 1:00 P.M. nor at any time thereafter. [Tr. pp. 152, 208.] His absence was noted at 1:00 o'clock [Tr. p. 152], and a search made for him in the forecastle and the messrom; but no general search of the ship was made, because it was assumed he had gone ashore to take a day off. [Tr. p. 191.] On April 25, Hutchison did not report for duty. [Pltf. Ex. 15.] On April 26, he was still absent from duty, and the Chief Mate telephoned the Baltimore police to inquire whether he was being held in custody. The police reported that a check of all precincts showed no one by that name being held. No other effort was made to ascertain his whereabouts. [Ex. 15.] Another seaman was obtained, and the Linfield Victory left Baltimore shortly thereafter, arriving at Philadelphia on April 29. [Ex. 15.] On April 30, 1951, Hutchison's body was discovered by the Chief Electrician at the bottom of the ventilator shaft in No. 2 masthouse, where the men had been working on April 24th. [Tr. pp. 190-191; Ex. 15.]

ARGUMENT.

1. The Motions for Directed Verdict and Judgment Notwithstanding the Verdict Were Properly Denied.

Appellant's assignments of error here are based on an alleged insufficiency of the evidence to prove: That appellant failed to provide a safe place to work; that Hutchison was acting in the course of his employment at the time of his injuries; that Hutchison's negligence was not the sole cause of his death; and that the amount of damages was proper.

A. Hutchison Was in the Course of His Employment at the Time of His Injuries and Death.

Appellant argues, what no one would deny, that at the time he suffered his injuries Hutchison was required to be in the course of his employment and implies that appellee was required to produce direct evidence showing the precise time at which Hutchison fell into the ventilator shaft. In the nature of the case—a fall resulting in death, unwitnessed and undiscovered for 6 days—evidence of the precise moment at which Hutchison fell into the shaft was unobtainable. Ample evidence was presented from which the jury could infer that Hutchison suffered his injuries and death between 11:00 A.M. and 1:00 P.M., on April 24, 1951. It was certainly within the province of the jury to draw such an inference. (*Tennant v. Peoria & P. U. Ry. Co.,* 321 U. S. 29, 35; *Lavender v. Kurn,* 327 U. S. 645, 653.) And there can be no doubt that during those hours he was in the course of his employment, whether ascending or descending

the ladder, before or after lunch. A seaman is in the course of his employment when returning to his quarters after securing a drink of water (*Holm v. Cities Service Transportation Co.,* 60 F. 2d 721, 722); returning to his quarters after filling a bucket of water with which to wash (*State Steamship Co. v. Berglann,* 41 F. 2d 456, 457); occupying the sleeping quarters provided for him (*McCall v. Interharbor Navigation Co.,* 156 Ore. 252, 59 P. 2d 697); remaining on deck while off duty (*Sunberg v. Washington Fish and Oyster Co.,* 138 F. 2d 801, 803); and borrowing bread from another vessel for a customary late hour snack (*Thompson v. Eargle,* 182 F. 2d 717). In fact, it has been held that a seaman continues in the course of his employment when departing from his place of work, and, therefore, an injury while using a ladder to leave his ship has been considered an injury in the course of his employment. (*Wong Bar v. Suburban Petroleum Transport Co.,* 119 F. 2d 745.)

Appellant attacks the right of the jury to draw inferences as set forth in the *Lavender* case, *supra,* arguing that it stands alone and has been repudiated by later decisions. But *Lavender* was followed on this point in *Reck v. Pacific-Atlantic Steamship Co.,* 180 F. 2d 866, and as recently as April, 1956, was cited with approval on the point by the Supreme Court in *Schulz v. Pennsylvania R. Co.,* 350 U. S. 523, 76 S. Ct. 608, 610, 100 L. Ed. (Adv. pp. 430, 432), where the Court said:

> "Fact-finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

B. There Was Substantial Evidence to Support the Finding That Appellant Did Not Furnish Hutchison a Safe Place to Work.

Appellee has summarized in its statement of the case the evidence showing that the port compartment of No. 2 masthouse was unlighted and the visibility inadequate, and that the ventilator shaft was uncovered and insufficiently guarded. Certainly this evidence, viewed most favorably to the jury verdict, would support findings that even with the masthouse door open there was inadequate visibility in the unlighted masthouse, and that with the door closed the masthouse was dark; and the jury was likewise entitled to find that, since every time a seaman went up or down the ladder he hovered over a ventilator shaft, the railings of which were wide enough to allow his body to pass through them, it was negligence not to take the simple, relatively inexpensive step of placing a screen over the shaft or erecting a bulkhead like that in the starboard compartment. It is obvious that a seaman climbing the ladder rapidly in an inadequate light could unknowingly reach the top of the ladder and simply by inertia be carried over the top of the bulkhead and down into the ventilator shaft; or that a seaman entering the masthouse to go down the ladder could misjudge the location of the ladder in the inadequate light, lose his balance and fall over or between the railings into the ventilator shaft.

It is settled that the trier of fact may find a negligent failure to provide a safe place to work where an area is inadequately lighted (*Lahde v. Soc. Armadora Del Norte,* 220 F. 2d 357; *Crawford v. Pope & Talbot, Inc.,* 206 F. 2d 784; *The Wearpool,* 112 F. 2d 245); or where there is insufficient protection around open areas (*Desrochers v. United States,* 105 F. 2d 919; *Johnson v. Griffiths S.S.*

Co., 150 F. 2d 224; *Helmke v. United States,* 8 Fed. Supp. 521).

The evidence that one could see in the masthouse and that the railings were sufficient protection, so strenuously argued by appellant, merely raised conflicts for the jury to resolve. The same is true of appellant's speculations that Hutchison may have hit his head on the masthouse door and fallen over the railings. (App. Op. Br. pp. 168-169.) In *Schulz v. Pa. R. Co., supra,* 350 U. S. 523, a tug fireman employed by respondent disappeared during his night duty hours and was found several weeks later, drowned. He was last seen walking toward the nearest of four tugboats on which he was assigned to work. There was some ice on the tugs. Three of the tugs were wholly unlighted; one partially illuminated by spotlights from the pier. Appellant had to tend all four tugs because of inadequate personnel. The Court reversed a judgment of dismissal, stating:

> "[T]he courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' "[1]

---

[1]In a footnote the court added: "Conversely, 'It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.' "

Appellants apparently would have this Court take judicial notice that pipe railings identical with those surrounding the ventilator shaft were standard equipment and, as a matter of law, met the standard of reasonable care, citing *Desrochers v. United States,* 105 F. 2d 919, and *Vileski v. Pacific-Atlantic S.S. Co.,* 163 F. 2d 553. The *Desrochers* case is in fact a judgment for plaintiff for failure to maintain a safety rope around a deep tank into which plaintiff fell. *Vileski* involved improper use by a seaman of railings normally used as handrailings on the side of boilers. (The seaman stood on the handrails, fell off, and was injured.) There is no finding in either case that any kind of railing or other guard is, as a matter of law, a standard or customary or sufficient safety appliance. The determination of the sufficiency of any safety appliance should be for the jury, whenever there is evidence that other and better devices are reasonably available to the employers. Certainly a clearer issue for the jury could scarcely be found than in this case, where every trip up or down the ladder exposed men to the ventilator shaft and where a simple, economical screen or bulkhead (such as the bukhead installed by the appellant around the starboard ventilator shaft) would have prevented the accident.

Appellant challenges the contention made by appellee's counsel in argument that an employer is required to exercise reasonable care to make a place reasonably safe even if "such an act entails doing something which coincidently makes the place absolutely safe." This argument does not impose a duty to make a place absolutely safe. Appellant would apparently argue that if a place can be made reasonably safe only by making it absolutely safe, an employer is for that reason free to leave it unsafe.

Appellant argues, without authority, that, because the Linfield Victory had been inspected by government agents, it is a presumption of law that those agents discharged their duty and exercised ordinary care, it is a presumption of law that the vessel was in class A-1 condition, and it is a presumption of law that the masthouse appliances were standard and customary equipment; and it argues that appellant was entitled to rely and act upon the assumption that the government, and its agents, had fully performed all their obligations and duties. The unsupported assertions of presumptions may be passed over, since appellant's contention that it was entitled to rely on the government inspections is simply incorrect. Government inspection certificates constitute evidence of due care and nothing more. They do not relieve the ship owner of his responsibility to provide a reasonably safe place to work, as the very cases cited by appellant at page 180 of its Opening Brief affirm.

> "The inspection certificates on which appellant relies so strongly are of course evidence bearing on the question of due care, but they are not more. . . ."
>
> *Sabine Towing Co. v. Brennan,* 72 F. 2d 490, 494.

> "It is difficult to admit that the fact of an appliance having been pronounced sound by an official inspector should be deemed to preclude the jury from considering whether his inspection was really an adequate one."
>
> *O'Connor v. Armour Packing Co.,* 158 Fed. 241, 249.

Finally, appellant argues that the constant use of the ladder by Hutchison and other seamen demonstrates that they considered it a safe place to work. The evidence was that there were only two ways in which men could get into or out of No. 2 hold that day: by the ladder in the

masthouse or the ladder at the aft end of Hatch No. 3. [Tr. pp. 202-205.] The testimony of Kalnin clearly established that the ladder at the aft end of Hatch No. 3 was between the winches and that the winches were in use on April 24, 1951. When the winches were in use the seamen were not supposed to use the ladder by the winches; the ladder in the masthouse was to be used "so you don't get hit with the winches loads"; during such times seamen were not supposed to use the one by the winches. [Tr. pp. 213-214.] It cannot reasonably be argued that where seamen have only one ladder to use, they certify by their use that it and the area about it is a safe place to work.

C. Hutchison's Contributory Negligence Was Not the Sole Cause of His Injuries and Death.

Appellant argues that Hutchison's contributory negligence in using the masthouse ladder was the sole cause of his fall into the ventilator shaft, since, as appellant speculates, if Hutchison had watched his opportunities, he could have gone up the ladder in the aft end of No. 3 hatch while the winches were stopped. As stated in the preceding paragraph, the ladder at the aft end of Hatch No. 3 was not readily available during this period and the ladder in the masthouse was the only available route. For that reason *Bohannon v. United States,* 92 Fed. Supp. 700, cited by appellant, is not applicable. There a seaman had a free choice of three routes to take to a particular part of the ship, one absolutely safe, one reasonably safe, and one very hazardous. The libellant took the hazardous route, and his injuries, when he was struck by a heavy wave, were held caused solely by his own recklessness.

That is not this case. The distinction is clearly made in *Rouchleau v. Silva,* 35 Cal. 2d 355, 217 P. 2d 929, wherein appellant's counsel in this action unsuccessfully urged the same argument upon the California Supreme Court. There a seaman, having a choice of two routes to a bait tank, used a plank instead of a ladder, but the evidence established that the plank was used as decedent had used it "at all times and under all circumstances whenever the men had occasion to go between the bait tank and the raised deck." (Pp. 360-361.) The Court, in affirming a judgment for plaintiff, rejected appellant's argument that it was the decedent's duty to go the safe way by the ladder and that his failure to do so was the sole proximate cause of his injuries. The Court stated at page 361:

> "[T]he rule is applicable when it is shown to be the duty of the employee to use the ordinary and safe way rather than one intended for an entirely different purpose. Here it was shown that the plank was the ordinary way; that it was expected that the men would use it at any time for the purpose of going across the four-foot space between the bait tank and the raised deck; and that during cleaning up activities after unloading it was the regular practice for the plank to be in place and in use while the skiff was still in the water."

To the same effect is

> *Marceau v. Great Lakes Transit Corp.,* 146 F. 2d 416, 418.

Hutchison being deceased, appellee was entitled to the presumption that he had used due care. The jury weighed the question of contributory negligence on the evidence and the presumption and concluded that Hutchison was

contributorily negligent, to the extent of 10%. The verdict shows a careful and conscientious weighing of a disputed issue of fact and a finding supported by evidence.

D. The Evidence of Appellee's Damages Was Sufficient to Support the Verdict.

The evidence respecting damages was that Hutchison earned an average of from $350 to $370 per month, as a rough estimate [according to the witness Kalnin, Tr. p. 197], and that in 1950 his gross wages were $4,705.96, on which income tax of $581.65 was withheld. Mrs. Hutchison testified as follows regarding Hutchison's salary:

> "Q. Mrs. Hutchison, did Mr. Hutchison in any way contribute to your support? A. Yes, whenever he came off a trip he would give me around seventy-five percent or thereabouts of his money. And he kept the rest, and we decided where to put it and what to do with it.
>
> Q. The jury cannot hear you. A. I am sorry. I said he would give me around seventy-five percent of his wages and kept the rest and that—well, we disposed of it, however we did, in the bank or whatever we wanted to do with it. You know, like any other family does.
>
> Q. That was his consistent practice? A. Yes, it was." [Tr. pp. 262-263.]

This evidence related directly to the measure of damages.

> "The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased."
>
> *Chesapeake & O. R. Co. v. Kelly,* 241 U. S. 485, 489.

> "The amount of contribution by the decedent during his lifetime to the claimed beneficiary has a direct bearing on the issue of reasonable expectation of pecuniary benefit."
>
> *Cleveland Tankers, Inc. v. Tierney,* 169 F. 2d 622, 624.

Even if the 75% which Mrs. Hutchison testified her husband gave her was the only loss of pecuniary benefit derived by her from his earnings—and Mrs. Hutchison's testimony indicates that in fact they disposed of the remaining 25% for their mutual benefit—appellant calculates that this amount, $3,084.22, multiplied by the 19-year life expectancy of Mrs. Hutchison, would equal $58,600.18. (App. Op. Br. p. 166.) The jury determined appellee's damages to be $50,000.00, demonstrating that they substantially discounted the higher figure. Appellant's assertion (App. Op. Br. p. 166), that the present value of an annual annuity of $3,084.22 "is considerably less than $50,000.00," is unsupported by any evidence in the record or elsewhere, since appellant's counsel introduced no evidence on the subject, did not cross-examine appellee regarding the benefit she received from Hutchison's salary, offered no instruction on damages, advised the jury he did not intend to argue damages, and made only a passing reference to that subject. [Tr. pp. 393-394.] Appellant chose to ignore the issue of damages, and appellee's evidence on the subject supports the verdict. In *Louisville and N. R. Co. v. Holloway,* 246 U. S. 525, 528, the jury was instructed that plaintiff could recover "such an amount in damages as will fairly and reasonably compensate [her] for the loss of pecuniary benefits she might reasonably have received . . ." and the Appellate Court held that the jury was entitled to consider,

not merely what she would have received for maintenance and support, but what she would otherwise have received from her husband. An award for plaintiff was affirmed, and the Supreme Court further observed that the defendant had failed to offer instructions on this point.

2. The Court Did Not Err in Rulings on Evidence.

A. Rulings on Custom.

Appellant complains of the admission of Capt. Crawford's testimony, (1) that there was a custom "to account for the working hours and places" of the crew at all times [Tr. p. 229], and (2) that there was a custom "to thoroughly illuminate any area in which a man or men are working" [Tr. p. 232]; and of appellant's admission that there was no permanent electrical installation in No. 2 masthouse.

Preliminarily, appellant asserts, without citing authority, that custom must be pleaded if a claim of negligence is based on it. The contention is rejected in *Ass'd Lathing & Plastering Co. v. Louis C. Dunn, Inc.,* 135 Cal. App. 2d 40, 286 P. 2d 825, and *Covely v. C. A. B. Const. Co.,* 110 Cal. App. 2d 30, 242 P. 2d 87.

Crawford testified that he had had a master mariner's license for 40 years, had sailed practically all over the world in numerous capacities on steam, motor, and sailing vessels, and was, when testifying, the principal of and instructor in Crawford Nautical School. This was sufficient to qualify his testimony as to a custom. (*Burke v. John E. Marshall, Inc.,* 42 Cal. App. 2d 195, 203-204, 108 Pac. 738, 743, action for damages for personal injuries by a stevedore.)

"During the course of the trial the plaintiff was permitted to testify over objections that during his eight years of work on the docks as a stevedore it was the custom of the operators to blow the horn of the lumber carriers when they were about 25 feet away from any men working on the dock. The contention of defendants that the court committed prejudicial error in permitting such testimony as to custom cannot be sustained. When the issue is one of negligence in the performance or failure to perform some act, it is clear that evidence of the ordinary practice and custom which is generally followed in the performance of such act under the same or similar circumstances is competent." (P. 203.)

Thomas v. So. Pac. Co., 116 Cal. App. 126, 2 P. 2d 544;

Miller v. Midway Fishing Tool Co., 106 Cal. App. 2d 612, 614, 235 P. 2d 630.

Appellant's admission regarding lack of lighting installations in No. 2 masthouse and Crawford's testimony on the custom regarding illumination were properly received, since other evidence, summarized in appellee's statement of the case, showed that without artificial illumination, there was insufficient visibility in the masthouse.

B. Rulings on Protective Devices on Other Ships.

The witness, Amundsen, testified that he had had 22 years' experience at sea as an A.B. [Tr. p. 130.] He had been on other ships that had access ladders in the masthouse. [Tr. p. 139.] He identified Plaintiff's Exhibits 1 and 2 as photographs of the No. 2 masthouse, including the ladder, the access shaft, and the ventilator shaft. [Tr. pp. 138-140.] *Looking at those photographs and pointing to the ventilator opening,* he testified that

other ships he was familiar with had screens over that opening [Tr. p. 142], in addition to railings encircling both access and ventilator shaft. [Tr. pp. 155-156.] The fact that the screens on other ships were specifically identified as being on ventilator shafts would, we submit, be a sufficient showing of similarity, but in addition Amundsen's testimony was directly related to the photographs, Plaintiff's Exhibits 1 and 2, and was in effect that he had seen screens on similar ventilator shafts adjacent to similar access shafts in similar masthouses.

Crawford's testimony regarding screens was cumulative to Amundsen's. He was familiar with the construction and design of victory ships [Tr. p. 226] and had been aboard about five [Tr. p. 235] although he had not visited the masthouse on all of them. [Tr. p. 235.] He, too, was shown photographs of the masthouse, including Exhibits 2, 4 and 7. With his attention directed to Exhibit 2 he was asked whether in his experience he had ever seen any other protective devices around the ventilator shaft, and he testified that he had seen "a heavy screen which excludes the danger" when there was an area of access close to it or in the vicinity. [Tr. pp. 233, 234.] Again, this testimony was restricted to ventilator shafts similar to those in the photographs.

Such evidence is admissible in negligence cases on the issue of due care or negligence under the circumstances.

> "The conduct of others evidences the tendency of the thing in question; and such conduct . . . is receivable with other evidence showing the tendency of the thing as dangerous."
>
> 2 Wigmore, Sec. 461, p. 489.

The cases so hold. *(Deshotel v. Santa Fe Ry. Co.,* 144 A. C. A. 227, 230-231, 300 P. 2d 910, 912-913 (jury

viewed intersections similar to one where accident occurred); *Jensen v. So. Pac. Co.,* 129 Cal. App. 2d 67, 74, 276 P. 2d 703, 708 (grade crossing accident; evidence of gates at similar crossings admitted); *Thurman v. Clune,* 51 Cal. App. 2d 505, 125 P. 2d 59 (evidence of safety practices at other ice hockey rinks admitted).)

Appellant's argument is, in fact, a demand for a showing of identical circumstances before admitting evidence of practices elsewhere, but

> "Identical conditions will rarely be found. Substantial similarity is normally sufficient. Determination of relevancy, including similarity of conditions in such a case is primarily the function of the trial judge."
>
> *Jensen v. So. Pac. Co., supra,* 129 Cal. App. 2d at p. 74, 276 P. 2d at p. 708.

3. The Trial Court Properly Refused to Strike Paragraph IX of the Complaint Which Alleges Negligence in Failing to Search for Decedent, and Appellant Was Not Prejudiced by the Instructions Thereon.

Appellee submits that the record shows that not only was no error committed by the trial court in refusing to strike paragraph IX of the complaint alleging negligence based upon a failure of appellant to search for decedent, but that in fact appellant was accorded more than its due by the instructions of the trial court on the subject.

Both causes of action of the First Amended Complaint alleged that Hutchison had fallen into the ventilator shaft because of appellant's negligence in failing to provide him a safe place to work and, in paragraph IX, that he remained in the ventilator shaft for six days because of the further negligence of appellant's personnel in failing to conduct a search for him.

The trial judge instructed the jury that in deciding the issue of negligence on the *first* cause of action for conscious pain and suffering they might consider both appellant's failure to provide Hutchison a safe place to work and the failure to conduct a search for him. It was on this cause of action that the jury rendered a verdict for the defendant.

The trial court also charged that in deciding the issue of negligence on the *second* cause of action for wrongful death, they might consider only appellant's negligence in failing to provide a safe place to work, taking from them the issue of failure to conduct a search. It was on this second cause of action that the jury rendered a verdict for the plaintiff.

Appellant asserts that the jury defied the instructions of the Court and considered failure to search on the cause of action for wrongful death. Recognizing that if the jury was entitled to consider failure to search, no prejudicial error results, appellant argues that the issue of failure to search was improperly included within either of appellee's causes of action for several reasons, which may be summarized as follows:

(a) The complaint failed to allege any proximate causal connection between failure to search and Hutchison's pain and suffering and death; (b) There is no evidence in the record showing a proximate causal connection between failure to search and Hutchison's pain and suffering and death; (c) An injury resulting from failure to search, like an injury from negligent case, is a non-statutory admiralty cause of action which does not survive to the personal representative. It could not come within the purview of the Jones Act because that Act is limited to injuries in the course of employment, and

Hutchison, from the time he struck the bottom of the ventilator shaft, was not in the course of his employment; (d) The allegation of failure to search should have been stated as a separate cause of action.

A. There Is Nothing in the Record to Show That the Jury Disregarded the Instructions of the Court.

If the jury followed the judge's instructions to disregard failure to search on the second cause of action for wrongful death, on which plaintiff recovered, it is immaterial whether the failure to search issue was before them on appellee's first cause of action relating to pain and suffering. The contention that the jury disregarded instructions is unfounded speculation. The sincerity of the jury in wanting to completely understand the legal withdrawal of this issue from their consideration was made apparent when they returned to the Court for further instructions on it. [Tr. p. 551.] Judge Tolin then gave a lengthy charge repeating his instruction that the issue must be disregarded. [Tr. pp. 551-560.] The foreman replied: "Your Honor, I feel sure that some jurors still feel that they should be permitted to consider the matter of negligence in not conducting a search" on the second cause of action and sought additional explanation. [Tr. p. 562.] Judge Tolin again complied, categorically and unequivocally instructing the jury that they could not consider failure to search on the second cause. [Tr. p. 563.] After concluding this and other instructions he asked:

> "Now, members of the jury, have we answered the questions you had in mind?
>
> Foreman Eager: Yes, sir.
>
> The Court: It is after 11:00 o'clock. Do you want to work further on the case tonight or not?

I see some of you nodding affirmatively. We don't want to make you work when you are fatigued.

We will send you to a hotel if you desire. You can resume deliberations—

Foreman Eager: I think we would like to work for a little while." [Tr. pp. 571-572.]

There is simply nothing in this colloquy between judge and jury to justify appellant's statements that "some of the jurors were still determined to use this evidence . . ."; that the jurors had a "recalcitrant attitude"; that "if they would refuse to follow the instruction the first time it was given they would continue such refusal." (App. Op. Br. p. 132.) Much less is there any warrant for the statement that some of the jurors "were not willing to return a verdict in favor of appellee on the claim for damages by reason of the death upon the basis of a finding in favor of appellee in respect of the averred negligent omission set forth in paragraph VIII, . . ." (App. Op. Br. p. 130.) On the contrary, the expression by the foreman and the jurors that the Court had answered their questions and they wanted to resume deliberations amply supports the fundamental presumption that juries are composed of rational people capable of understanding and following the charge of the Court. (*Lazier Gas Engine Co. v. DuBois,* 130 Fed. 834, 838; 24 Cal. Jur. 795.)

B. The Issue of Failure to Search Was Properly Included in Both of Appellee's Causes of Action.

Appellee submits that both the pleadings and the evidence properly presented this question as part of the issue of negligence for the jury's determination on both causes of action of the amended complaint, so that no

prejudicial error could have resulted if the instructions of the Court had been disregarded. (*Lazier Gas Engine Co. v. DuBois, supra,* 130 Fed. at p. 839.)

Appellant's contentions regarding the failure to search issue are similar to those made by appellant in its brief on the first appeal of this case, and they were rejected by the decision of this Court reversing a directed verdict on that issue for appellant. This Court expressly declared, citing *The Black Gull,* 82 F. 2d 758, that appellee's two causes of action were recoverable under the Jones Act and survived Hutchison's death.

In any event the contention is untenable for the reasons that: (a) the proximate causal connection between failure to search and Hutchison's pain and suffering and death was sufficiently alleged in the complaint; (b) appellant is not in a position to argue that there was no evidence that a failure to search proximately contributed to the pain and suffering or death of decedent, because appellant elected not to include the medical testimony in the Transcript of Record; (c) the argument that a negligent failure to search for Hutchison is not within the purview of the Jones Act, because the incapacitated Hutchison was no longer in the course of his employment, is in the teeth of the cases; and (d) the element of appellant's alleged negligence in failing to search was a proper issue in each cause of action, and the trial court's instructions that the jury could consider that aspect of negligence only on the first cause of action highly favored appellant, according appellant more than it was entitled to.

The strained and devious argument of appellant puts appellee in the peculiar position of arguing at length matters which are material only if counsel's unfounded speculations are true that the jury disregarded the Court's

instructions and considered the matter of failure to search on the second cause of action, the only one on which plaintiff recovered. To pursue this argument on what must certainly be deemed moot points, we are required to point out that the pleadings were sufficient on an issue in fact taken from the jury and that appellant received more favorable treatment than it was entitled to on the issue. With these preliminary comments we turn to the task.

The first amended complaint alleged facts sufficient to show the proximate causal relation between the failure to search and the conscious pain and suffering and wrongful death. After alleging in paragraph VIII of the *first* cause of action that Hutchison sustained personal injuries and conscious pain and suffering in his fall into the ventilator shaft and that his injuries were directly caused by appellant's negligence in failing to provide him a safe place to work, appellee alleged in paragraph IX that appellant and its employees "were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall . . ." and in paragraph X "That as a result of the premises" Hutchison "sustained damages." In the *second* cause of action, after realleging paragraphs VIII and IX, appellee alleged that "as a result of said injuries" Hutchison "died at some time between the date of said fall . . . and the date on which" he "was discovered," and alleged damage to plaintiff as a direct consequence of the death. These alleged facts sufficiently show the proximate causal connection between the failure to search and the pain and suffering and death.

> "[T]he well settled rule of pleading in negligence cases, although requiring a positive connection between the act of negligence and the injury to be alleged, does not require that the complaint aver in terms that such negligence was the proximate cause thereof if such connection appears by fair intendment from the facts alleged . . ."
>
> *Moore v. Burton,* 75 Cal. App. 395, 400, 242 Pac. 902.

To the same effect see:

Tucker v. Cooper, 172 Cal. 663, 668, 158 Pac. 181.

If anything, even greater liberality is indulged under Rule 8(a), Federal Rules of Civil Procedure, requiring the pleader to set forth merely "a short and plain statement of the claim showing that the pleader is entitled relief." (See *Palum v. Lehigh Valley R. Co.,* 9 F. R. S. 12e.311, case 1; *Dioguardi v. Durning,* 139 F. 2d 774, 775.)

In any case appellant could not have been prejudiced by the pleadings. The very intensity and persistence of its attacks on paragraph IX reveal a clear knowledge of the claimed connection between the negligence there alleged and appellee's injuries, and the jury was left in no doubt by the instructions that any claimed negligence of defendant must be a proximate cause of the damage claimed before they could render a verdict for plaintiff. [Tr. pp. 511-512.]

The allegation of a negligent failure to search was properly included with the allegation of a negligent failure to provide a safe place to work in one cause of action. A negligent failure to conduct a reasonable search for Hutchison clearly would constitute "negligence of any of the officers, agents, or employees" of appellant. (45

U. S. C., Sec. 51.) The shocking suggestion that it would not be actionable negligence under the Jones Act because the incapacitated Hutchison was no longer in the course of his employment is contrary to many decisions. (*Cortes v. Baltimore Insular Line,* 287 U. S. 367 (administrator recovered under Jones Act for failure to furnish care for seaman stricken with pneumonia), cited with approval on the point in *DeZon v. American President Lines,* 318 U. S. 660; *Harris v. Penn. R.R. Co.,* 50 F. 2d 867 (ship owner liable for failure to rescue member of crew who fell into sea); *Dinicola v. Pa. R.R. Co.,* 158 F. 2d 856, 857; *Curran v. Std. Dredging Co.,* 112 F. 2d 163.) In none of these decisions was the incapacitated seaman any more "subject to any call of duty" (App. Op. Br. p. 129) than was Hutchison at the bottom of the ventilator shaft.

The contention (also, we submit, moot) that the negligent failure to search should have been stated as a separate cause of action and that it was not proper to state in one cause of action negligence in failing to provide a safe place to work and further negligence in failing to search, where both proximately contributed to decedent's pain and suffering or death, is likewise contrary to law. (*Original Ballet Russe, Ltd. v. Ballet Theater Inc.,* 133 F. 2d 187, 189: "The fact that in pleading his claim the plaintiff has charged the defendants with accomplishing the harm by acts which viewed independently might themselves be deemed torts does not mean that he has alleged several causes of action which must be stated in separate counts"; *McCormick v. Moore-McCormack Lines, Inc.,* 54 Fed. Supp. 399, an action for personal injuries and for maintenance and cure, in which the defendant made a motion that plaintiff be required to state separately which injuries were suffered in the fall and

which from failure to provide cure. The motion was denied; *Chiavola v. Montgomery Ward & Co., Inc.*, 7 F. R. D. 85, 86.)

Appellant attempts the argument (again moot) that there is an absence of evidence in the record to show that failure to search proximately contributed to the damages claimed on either cause of action. (App. Op. Br. p. 123.) If appellant intended to make this argument, it was obligated to include in the record the medical testimony on the question whether Hutchison lived or experienced conscious pain and suffering after his fall. The arguments of counsel, which are in the record, reveal that such evidence was introduced. [Tr. pp. 380-384, 450-453.] Not having included that testimony, appellant may not now be heard to argue that there is no evidence of proximate causal connection from failure to search.

4. Appellant Was Not Prejudiced in the Statement of Objections to Instructions.

Appellant cannot seriously contend that it was prejudiced regarding the stating of objections to instructions. The trial court instructed the jury in less than an hour. [Tr. p. 528.] Appellant's counsel, although the Court attempted to restrict him to one-half hour for statement of objections [Tr. p. 528], took substantially longer than that [Tr. p. 546] and when he was admonished by the Court, the following colloquy occurred between Court and counsel:

> "Mr. Gallagher: May I do it this way, your Honor, in an effort to conserve time: If your Honor will state that in giving the instructions, which you have given, you had in mind all of the defendant's proposed instructions, and that anything

which your Honor's instructions do not cover, which may be covered in the defendant's proposed, you intended to not give, then I can say, 'May I have a general exception upon the ground that the court committed error in refusing to give those parts of the defendant's proposed instructions which cover matters not covered by the instructions given by the court?'

The Court: A general exception is noted.

Mr. Gallagher: That is satisfactory to your Honor?

The Court: Yes.

Mr. Gallagher: Your Honor doesn't call upon me to point out the specific defects that I claim exist?

The Court: I do not . . ." [Tr. pp. 546-547.]

All of these proceedings were outside of the presence of the jury. Appellant thus was granted a general exception to the Court's refusal to give its instructions and there was no possible ground for asserting prejudice.

Appellant also goes to extreme lengths in its brief (pp. 141-142) to assert that the trial court prejudiced the jury against appellant by its remarks prior to the stating of exceptions to instructions. Appellee considers any lengthy answer to these contentions unnecessary. The record amply demonstrates that Judge Tolin behaved with remarkable restraint, and impartiality, before the jury, in this as in all other phases of the case. We must, however, take exception to a misstatement of fact in appellant's argument, when it asserts that one of the judge's statements to the jury on the subject of jury instructions was announced "in an angry mood." (App. Op. Br. p. 141.) There is absolutely nothing in the record to indicate that that or any other statement was

made in the presence of the jury in an angry mood, and in fact the statement was made, like all of Judge Tolin's statements to the jury in this case, in a calm, dispassionate tone of voice and manner of expression.

Appellant further contends that Judge Tolin's conduct outside the presence of the jury revealed a "deep animosity . . . harbored against appellant's attorney." Appellant contrasts Judge Tolin's statements on October 14 regarding the intemperancy of his advocacy [Tr. p. 539] with the statement on the previous day that he had not felt moved to make any criticism of the conduct of appellant's attorney in the presence of the jury. [Tr. p. 354.] Appellant's counsel makes no mention that on the morning of October 14, after both sides had rested and after counsel had presented their opening arguments to the jury, appellant's counsel, in the presence of the jury, moved to reopen the case for the purpose of presenting additional evidence in response to a juror's question. [Tr. pp. 465-467.] It was after this wholly improper action by appellant's counsel that the remarks he complains of were made. In any event, whatever may have been the relationship between the Court and counsel (and it would be unreasonable to overlook that Judge Tolin must have had the opinion of this Court in the previous appeal from this action in mind in his handling of the second trial), the record abundantly shows a completely fair and impartial handling of the trial.

5. **The Trial Court Fairly and Correctly Instructed the Jury on All Material Issues, and Committed No Prejudicial Error in Refusing to Give Appellant's Requested Instructions.**

During the course of the trial both parties submitted numerous requested jury instructions to the Court. The Court concluded that counsels' instructions were excessively long and argumentative and determined to reject all offered instructions. [Tr. pp. 332-334.] At the conclusion of argument the Court formulated its own charge to the jury. [Tr. p. 494.] Appellant asserts numerous errors in the charge as given and in the failure of the Court to instruct according to its offered instructions.

It is settled that a party has no vested interest in any particular form of instructions. What the language of the instructions shall be is for the trial judge to determine. (*Cohen v. Evening Star Newspaper Co.,* 113 F. 2d 523.) If, considered as a whole, without isolating or separating portions of the charge, the instructions fairly and adequately presented the issues to the jury for its determination, the requirements of the law are satisfied. (*Van Camp Seafood Co. v. Nordyke,* 140 F. 2d 902, 908; *Casey v. Seas Shipping Co.,* 178 F. 2d 360, 362.) It is not prejudicial error to refuse to give a requested instruction, even though it be an accurate statement of law, if the issues have been fairly and correctly covered in the general instructions given. (*Thiringer v. Barlow,* 205 F. 2d 476, 477.) Moreover, even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a con-

sideration of the entire charge. (*United Electric R. & M. Workers of America v. Oliver Corp.,* 205 F. 2d 376, 387; *International Paper Co. v. Busby,* 182 F. 2d 790.) "It is unfair to the trial court to pick out certain portions of its charge omitting others which limit and qualify the same and then insist that the court committed error." (*Grand Trunk Western R. Co. v. H. W. Nelson Co.,* 116 F. 2d 823, 835 (C. C. A. 6, 1941).) And a judge can modify or correct instructions, amplify his charge, and give additional instructions, on its own or counsel's motion. (*United States v. Hess,* 41 Fed. Supp. 197, 217; *Southern Pacific Co. v. Souza,* 179 F. 2d 691, 694; *Clarke v. United States,* 132 F. 2d 538, cert. den. 318 U. S. 789, 63 S. Ct. 992, 87 L. Ed. 1155.)

An examination of the portion of appellant's offered instructions contained in the printed transcript demonstrates the wisdom of their rejection by the Court. In its brief appellant says that "instructions to a jury should be simple, concise, direct, distinct, accurate, impartial, and confined to the genuine issues of material fact raised by the pleadings . . ." (App. Op. Br. p. 172.) Appellant submitted to the trial court over 70 instructions. The printed instructions cover 58 pages of the transcript. [Tr. pp. 24-81.] They are unnecessarily repetitive, contain inaccurate statements of the applicable law, and almost without exception are arguments for appellant. To take a single example, which we think typical, instruction No. 47 [Tr. pp. 64-65] on the duty of care required of Hutchison, omits all reference to the doctrine of comparative negligence and states: "If you find that he was guilty of negligence and that such, if any, negligence was the sole proximate cause of personal injury and death, your verdict must be in favor of the defendant with respect to each claim asserted by the plaintiff." While the

quoted formula is, in isolation, a correct statement of the law, the instruction as a whole would almost certainly lead the jury to think that if Hutchison was negligent appellee could not recover.

Appellant's attack on the charge given by the Court is characterized by unjustifiable distortions of the judge's language of which the following are illustrative:

(a) Appellant asserts that the judge instructed the jury that *"Neither* the *date* nor *time* of the accident was material!" (App. Op. Br. p. 173.) The Court actually said that "the *exact* day, the *exact* hour of the incident . . . the *exact* time is not material. The *exact* time of the events, . . . need not be spelled out in detail by the evidence" [Tr. pp. 509-510] and the Court immediately added: "Mr. Hutchison must have been injured while in the course of his employment, in order for Mrs. Hutchison to recover damages here." [Tr. p. 510.] This was, in effect, an instruction that the issue for the jury was not the exact time of Hutchison's fall but whether he was in the course of his employment, and, together with other instructions on this subject [Tr. p. 509], correctly states the law. (See *Schulz v. Pa. R. Co.*, ... U. S. ....., 76 S. Ct. 608, 100 L. Ed. (Adv. p. 430).)

(b) Appellant charges the Court with having said that "The only possible basis of contributory negligence would be the *mere fact* that Hutchison feeling 'rugged' and with a 'hang-over,' went about masthouses and climbed up and down ladders." (App. Op. Br. p. 174.) A reading of the actual instruction discloses the unfairness of the paraphrase [Tr. p. 513] and refutes the contention. After discussing the issue raised by the testimony that Mr. Hutchison might have been feeling "rugged" or

had a "hang-over," the Court instructed that if the jury found Hutchison guilty of negligence in that respect, "or if you find there was some other contributory negligence —at the moment as I sit here that is the only thing in the evidence which occurs to me, but you will be guided by what occurs to you—that might be felt, upon a full analysis by a jury, to be contributory negligence, if you find there was," then the doctrine of comparative negligence was applicable. [Tr. p. 513.] This instruction cannot be twisted into a statement that a hang-over was the only possible basis of contributory negligence in the evidence.

(c) Appellant asserts: "The trial court plainly told the jury that if a 'seaman' can establish negligence of the owners of the vessel or her officers, agents, or employees, then he has a right of action for damages. (Assigned error 33(h).)" (App. Op. Br. p. 183.) We think no further refutation of this charge is necessary than a quotation of the instruction assigned as error 33(h):

> "The *gist* of an action under the Jones Act is negligence. In order to maintain an action under the Act, the seaman must prove *negligence,* for unless the seaman can establish *negligence* of the *owners* of the vessel, *or her officers, agents, or employees,* no liability exists." [Tr. p. 509.]

The instructions given by the trial judge fully and accurately charged the jury on all issues. Appellant's attack on the instructions picks isolated statements out of context to assign as error, and overlooks portions of the charge to the jury which meet the objections. We will, therefore, take up seriatim appellant's objections to the instructions, and cite the portions of the charge which meet the objections.

(1) Appellant charges that the instructions regarding the province of the jury as judges of the facts [Tr. pp. 493-494] were "a clear invitation to the jury to be as arbitrary and capricious as it might choose to be," (App. Op. Br. p. 175), and asserts that the failure to give its instructions (assigned errors 34a and 34b) was error. The court, however, at least four times in his charge, told the jury of the limitations on their power in language which amply covered the matter requested by appellant:

> "Your judgment, that is, your verdict will be based upon the evidence." [Tr. p. 493.]

On the same page of the transcript the paragraph which appellant partially quotes in Assigned Error 33A, reads in full as follows:

> "As each of the attorneys have told you, you are the exclusive judges of the fact. That means that so far as your decision upon the facts is concerned, *which is all that is going to be submitted to you to decide,* your judgment is final, and no one can inquire into it." [Tr. p. 493; omitted portion emphasized.]

The Court again stated regarding its instruction taken from B. A. J. I. No. 28:

> "Should you consider any of these questions, either in your own private reasoning, or in open discussion, you must look for an answer only to the evidence admitted in the trial of the action." [Tr. p. 504.]

Referring to the amount of any verdict for plaintiff, the Court said:

> "It means that your judgment may not be arbitrary or fanciful, but must have evidence behind it." [Tr. p. 516.]

And in closing his charge to the jury the Court stated:

> "You are to look only to the evidence in the case . . . You are not to be guided by the reasons for rulings on objections, but to consider the evidence, such evidence as did get in, and not speculate upon what evidence might have gotten in had there not been objections or other rulings of the court . . . You are not to be guided by any feeling of passion, prejudice, pity, or sympathy. Decide the case upon an intellectual basis, that is, an analysis of the evidence and the measuring of that evidence by the law which the court has given you." [Tr. pp. 521-522.]

In this connection appellant criticizes the judge's statements that the judgment of the jury on the facts "is final" and could not be "set aside;" but this is no more than appellant's counsel told the jury in his argument when he said:

> "It is up to them to give you enough evidence to make you fairly certain you are not making a serious mistake, *because any mistake you make cannot be corrected.*" [Tr. p. 438; emphasis added.]

(2) The instructions on negligence are said to show the Court's determination to expand this issue "so that the jury could roam at will" over "every possible factual basis of liability within the four corners of the Jones Act." (App. Op. Br. p. 176.) To sustain this extreme charge appellant is compelled to recognize three separate places in which the court did restrict the jury to the allegations of the complaint and to argue that because the court spoke of "the nature of negligence which was charged," "the type of negligence that is alleged," "the particular kind of negligence charged here," it did not restrict the jury to the negligence alleged in

the complaint; and appellant is further compelled to argue that the use of the word "because" did not satisfactorily explain to the jury the doctrine of proximate cause. As to the latter point, the court had already expressly defined proximate cause. [Tr. p. 511.]

Far from expanding the issues of negligence, the trial court repeatedly restricted the jury to the precise kind of negligence charged in the complaint, even reading the appropriate allegations of the complaint to the jury for their guidance [Tr. pp. 506-507, 509, 518, 548, 559-560]; and it is surely accurate to refer to a failure to furnish sufficient safety appliances as a "kind" or "type" of negligence. The following portions of the charge, given expressly for the second cause of action, reveal the explicitness of the instructions on this point.

> "The cause of action which the plaintiff has charged here was read to you earlier. She is restricted to the cause of action which has been charged there, that is, you are not to go beyond the nature of negligence which was charged and seek out, to see if there was some other negligence, because she has picked out what she thought was negligence and sued upon that, and the case is restricted to that." [Tr. p. 548.]

> "All of this, of course, is only provided you do find that the death was caused as has been contended by the plaintiff, and the plaintiff contends that it was '* * * directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work." [Tr. p. 559.]

> "Now, when he died if he did not die because of negligence she has no claim. If he did not die because of the particular kind of negligence charged here she has no claim upon this defendant. But if he did die because of the particular negligence, which has been charged here, then her right accrued the moment he died." [Tr. p. 560.]

Moreover, even if there had been any undue generality in the instructions on negligence, appellant could not have been prejudiced. The record discloses clearly that, setting aside the question of failure to search, the only evidence of negligence presented to the jury or argued by counsel related directly to the insufficiency of safety appliances in and about the ventilator shaft. Under similar circumstances it was held in *Fleming v. Husted,* 164 F. 2d 675, that no error resulted from instructions more general than the evidence. There the complaint had charged that the defendant trustees had permitted a station platform to be in "a defective, dangerous, and uneven condition and allowed depressions to remain therein," and the jury was instructed in that language regarding negligence. All of the evidence related specifically to the broken condition of the curb along the platform, and the defendants alleged error in refusing to limit the issue of negligence and proximate cause in express terms to that condition. The Court rejected this argument stating:

> "Plaintiff's attack and testimony were directed solely against the condition of the curb . . . On the basis of the trial proceedings and the record, we can see no room to doubt that the jury understood that, in adopting the expressions from the complaint, 'platform,' 'uneven condition' and 'depressions,' in the instructions, the court meant and was referring only to the condition of the curb.

"More apt and narrower terms could have been used, but it is not uncommon practice for instructions to state the issues of a case in the language of the pleadings unless some reason exists for not so doing."

Fleming v. Husted, supra, at pp. 68-69.

(3) Appellant objects to the instructions given by the Court concerning the Certificates of Inspection issued by the U. S. Coast Guard for the Linfield Victory and to the refusal to give appellant's proposed instructions on that subject. The court instructed on this matter by first giving the standard instructions on expert witnesses in B. A. J. I. Nos. 33 and 33a. [Tr. pp. 504-505.] It then referred specifically to the Certificates of Inspection and advised the jury correctly that such Certificates were to be considered as evidence, to be weighed with all the other evidence, [Tr. p. 505], but that they could not "suffice" for the duty of the jury; that the duty of judging the issue rested on the jury, which must give its judgment "independently" of the witnesses; that the "opinions of witnesses" were "not a substitute for the jury." [Tr. pp. 504-506.]

Appellant singles out the words "suffice" and "independently" and attacks them on the ground that they would lead the jury to disregard the evidence in determining this issue, and amounted to an instruction that the Certificate of Inspection was not sufficient to support a finding that the ventilator shaft was reasonably safe; but the criticized language must be considered in context. The instruction as a whole accurately told the jury that the Inspection Certificates were evidence of due care but were not more; that the jury was not bound by them,

nor by any other expert opinion, but must exercise their judgment on the basis of all the evidence. This correctly states the law. (See *supra,* section B of this brief.)

The court properly rejected appellant's instructions 58a and 60 [Tr. pp. 73-74] on this subject, which could only have misled the jury. Both instructions assert as presumptions of law that the Coast Guard had examined the Linfield Victory, had issued a certificate of inspection, and had satisfied itself that the vessel was seaworthy and did not have on board any equipment, apparatus, or appliances not conforming to the requirements of law; and charge that, unless these presumptions were controverted by other evidence, the jury was bound to find according to such presumption. There was no basis for any presumption concerning the acts of the Coast Guard, because appellant had introduced into evidence the certificate of inspection for the period here relevant and had introduced the testimony of Captain Dyer as to the meaning of the certificate. Appellant's instructions told the jury something quite different and completely improper—that the inspection certificate raised a presumption that appellant had furnished sufficient appliances, in accordance with which the jury would have to find unless controverted. Appellant cannot complain of a refusal to give inaccurate or misleading instructions. *(American Surety Co. v. Blount County Bank,* 30 F. 2d 882, 884.)

(4) The Court instructed that a party seeking to deny a rebuttable presumption must present contrary evidence. [Tr. p. 501.] Appellant assigns error in the failure to instruct, as in appellant's instruction No. 51 [Tr. pp. 66-67], that appellant might rely on evidence presented

by appellee in rebutting a presumption and need not present affirmative evidence. Again, appellant is not in a position to complain of error on this point, because its offered instruction was an inaccurate and misleading formula instruction. After stating generally the law on evidence rebutting presumptions, appellant's No. 51 states:

> "Thus, if the evidence *produced by the plaintiff* fails to prove negligence on the part of defendant by a preponderance thereof or fails to prove by a preponderance that Nathanael Patrick Hutchison sufferred injury or death as a proximate result of such, if any, negligence, your verdict would have to be in favor of the defendant, *even if the defendant has produced no evidence* whatever upon the subjects of alleged negligence on its part or proximate cause." [Tr. pp. 66-67; emphasis added.]

The instruction as a whole graphically illustrates the reason for the rejection of appellant's proposed instructions *in toto*. The quoted portion has nothing to do with presumptions. Moreover, appellant had produced evidence indicating its own negligence. [*E.g.,* Webb's testimony on the need for artificial illumination when working in the masthouse. Tr. pp. 251, 252.] The jury could only have concluded from the whole instruction that appellee was required to prove her case solely from her own evidence, whereas appellant could rely on its own and appellee's evidence!

(5) The charge that the instructions on negligence and contributory negligence were one-sided has been substantially answered in appellee's discussion of points 2 and 4 under this heading. Appellant argues that the Court instructed the jury with particularity on appellant's duty of care and refused to so instruct regarding Hutchi-

son's duty of care, but the record shows that in addition to the general instructions on negligence, contributory negligence, and proximate cause [Tr. pp. 510-512], the court instructed the jury specifically and in detail of what might constitute contributory negligence by Hutchison and what its effect would be. [Tr. pp. 512-513.] Appellant cannot complain of the refusal of its requested instruction No. 47, [assigned error 34 qq; Tr. pp. 64-65.] That instruction, as appellee has already pointed out, distorts the doctrine of contributory negligence in such a manner as to conceal from the jury the applicability of the doctrine of comparative negligence.

The instruction given by the court was correct as a statement of the burden of proof. *(Reynolds v. Roll,* 122 Cal. App. 2d 826, 838-839, 266 P. 2d 222, 230.) In *Blanton v. Curry,* 20 Cal. App. 2d 793, 129 P. 2d 1, cited by appellant, (in which no proper instruction on the subject was offered by the appellant), the Court observed that a similar instruction was a correct statement of the law, that it did no more than inform the jury on the question of burden of proof, and that "[a]lthough incomplete in form, no harm could have resulted from the giving of the criticized instruction." *(Blanton v. Curry, supra,* at p. 805 of 20 Cal. App. 2d, and 8 of 266 P. 2d). It is also patent that the jury was instructed to and did weigh all evidence on the issue of Hutchison's due care, the only issue on which there was a presumption benefiting appellee. In his argument to the jury counsel for appellant relied on appellee's evidence to show Hutchison's contributory negligence. [Tr. pp. 409-410, 437, 441-442.] The Court, in its instructions on contributory negligence, specifically discussed the question whether Hutchison might have felt rugged or had a hang-over

and instructed that if the jury so believed they could find him contributorily negligent. [Tr. p. 513.] All of that evidence, of course, was from appellee's witnesses. The court further instructed that if there was some other fact that might be felt "upon a full analysis by a jury" to show contributory negligence, they should reduce any recovery accordingly. And the answers of the jurors to the interrogatories revealed that the jury had considered the issue of contributory negligence and had found Hutchison to be contributorily negligent, demonstrating that appellant had carried its burden of proof on that point.

(6) The instruction given by the Court on an employee's right to assume the exercise of reasonable care to furnish a reasonably safe place within which to work, in the absence of notice to the contrary, [assigned error 33e; Tr. p. 508], whether applicable or not, could not have prejudiced appellant, since the court instructed the jury on contributory negligence and its effect. The very cases cited by appellant on this point hold its objection untenable. In *Thompson v. Camp,* 163 F. 2d 396, the Court declared that even if an instruction that plaintiff was entitled to presume the exercise of due care by his employer was inapplicable, no prejudice resulted because

> "The District Judge also gave an instruction on contributory negligence . . . which necessarily gave effect to any knowledge that Camp may have had about the condition of the premises." *Thompson v. Camp, supra,* p. 402.

The vice in appellant's instruction No. 47 we have just discussed.

(7) Appellant alleges a failure to instruct as to the issues raised by the pleadings and asserts that the Court should not have read the complaint. The Court may in its discretion read the pleadings to the jury. *(Illinois Cent. R. Co. v. Sigler,* 122 F. 2d 279, 286; *Norfolk & W. Ry. Co. v. Trautwein,* 111 F. 2d 923, 925; *Earl v. San Francisco Bridge Co.,* 31 Cal. App. 339, 349, 160 Pac. 570, 574.) The Court instructed the jury that the allegations of the complaint must be proved by evidence and that plaintiff had the burden of proof as to whether decedent was in the course of his employment, whether the defendant was negligent and whether its negligence was the proximate cause of the decedent's death. [Tr. pp. 499, 510, 555, 559-560.]

Appellant tortures isolated portions of the charge to allege that the jury must have concluded, from the instructions that appellee had "a cause of action," that the court was telling them that appellee had a right to recover from appellant. We are constrained to label this assertion an affront to the intelligence of the jury. The charge of the Court plainly told the jury that they must find for the plaintiff only if she had carried her burden of proof as to the essential issues. The same must be said of appellant's argument that the jury was told it was a "fact" that appellee lost the support of her husband due to the negligence of the defendant. [Tr. p. 560.] The criticized sentence is preceded by a full explanation of the basis of plaintiff's action, which includes the following:

> "All of this, of course, is only provided you do find that the death was caused as has been contended by the plaintiff, and the plaintiff contends that it was '* * * directly caused by reason of the negligence

> of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work.'" [Tr. p. 559.]

(8) Appellant's contentions that the trial court told the jury "that in the mere event of injury Hutchison was entitled to" his rights under the Jones Act and that "if the jury decided 'the second cause of action,' it was to 'decide it in her favor for the damages which she had suffered'" (App. Op. Br. p. 183), are equally insubstantial. The quoted remark as to the second cause of action was made by the court in distinguishing Mrs. Hutchison's status as a claimant under the second clause from her status under the first cause, and a part of the same charge with respect to the second cause reads as follows:

> "Liability, if it exists, [referring to the second cause of action] depends on the same facts respecting negligence, if it existed, contributory negligence, if it existed, and the need for proximate cause, and so forth, as the first cause of action." [Tr. p. 518.]

The comments of the Trial Court that the deceased was a contributor to appellee's support complained of by appellant [Tr. pp. 518-519] were not made argumentatively nor in such manner as to arouse passion or sympathy, but were made as a matter of undisputed fact to distinguish the second cause of action from the first.

(9) The jury returned to the Court for further instructions after several hours of deliberation and disclosed by the questions and comments of the foreman that they, or some of them, felt entitled to consider the issue of negligent failure to search as an item of negli-

gence with respect to the second cause of action. There is no evidence whatsoever in the record that the jury was, as appellant asserts, in a "rebellious and sympathetic state of mind." (App. Op. Br. p. 100.) Appellant asserts that in answer to the jury's request for a re-statement of the instructions regarding the applicability of failure to search to the second cause of action, the Court assumed in its instructions as an established fact that Hutchison was injured by appellant's negligent failure to provide a reasonably safe place to work. Appellant's brief at this point (pp. 184-185) places several phrases in quotation marks, but nowhere is there a reference to the transcript of record or to an assignment of error. Appellee has read carefully the entire charge to the jury when they returned for instructions, and cannot perceive any point in that charge in which the court assumed a negligent failure to search.

The instruction that there was only one law suit in which appellee could collect and that the jury would have to determine the natural expectancies and what sum could be awarded at that time [assigned error 33ee; Tr. p. 559], is surely a correct statement of the law. Appellant asserts prejudice, citing *Virginian Railway Co. v. Armentrout,* 166 F. 2d 400. A reading of that case will indicate the gulf between it and the instant action. There a 13-month old infant lost all or part of both arms in a railroad accident, and a reading discloses that the Appellate Court was dealing with an inflamed jury whose verdict the court considered grossly excessive. In this

case, the charge of the trial judge was fair and impartial, and no prejudical error could have resulted to defendant from the portion criticized. Appellant's counsel told the jury himself that they had only one chance to decide this case, when he said in speaking of liability that "you want to be satisfied that your verdict is just, if you bring in one against the defendant," and "it is up to them to give you enough evidence to make you thoroughly certain you are not making a serious mistake, because any mistake you make cannot be corrected." [Tr. p. 438.]

(10) The Court gave an instruction from B. A. J. I. (No. 303-A) that the prudence required of appellant in the exercise of ordinary care increases or decreases "as do the dangers that reasonably should be apprehended." Appellant argues that the instruction does not intelligibly cover the doctrine of foreseeability. The instruction embodies the doctrine of the cases, *Ericksen v. So. Pac. Co.,* 39 Cal. App. 2d 374, 246 P. 2d 642, cert. den. 344 U. S. 897, 73 S. Ct. 277, 97 L. Ed. 693; *Truitt v. So. Pac. Co.,* 112 Cal. App. 2d 218, 245 P. 2d 1083; and none of appellant's cited cases contains either a holding or a dictum that the instruction is improper. *Sundberg v. Washington F. & O. Co.,* 138 F. 2d 801, in fact, states substantially the same doctrine at p. 803:

> "Proof of negligence on the part of the shipowner involves at least a showing that under existing circumstances the shipowner or his agents should reasonably have anticipated the danger of bodily injury to a member of the crew."

The instructions to the jury fully and thoroughly covered the essential issues in this action and the applicable law, and any departures from strict legal phraseology were well within reasonable tolerance. As said in *Gray v. Dieckmann,* 109 F. 2d 382, 388:

> "A judge in instructing a jury at *nisi prius* cannot be held up to the exactitude of legal expression. He must apply his instructions to a jury with a broad brush. If his instructions are substantially correct and contain no misleading errors, it is sufficient."

Conclusion.

Appellee respectfully submits that the judgment is amply supported by the evidence and that there were no errors occurring during the course of this trial which would require its reversal, and prays that the judgment be affirmed.

Respectfully submitted,

SIMPSON, WISE & KILPATRICK,

By RAYMOND C. SIMPSON,

GEORGE E. WISE and

ROBERT J. KILPATRICK,

Attorneys for Appellee.